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SOME OF THE RIGHTS OF TRADERS AND LABORERS.

TRADERS and laborers have some right in their trades or callings which others cannot lawfully infringe. The extent of the right is the subject of much dispute, and is not very satisfactorily defined by the decisions. This is due in part to the fact that many of the cases deal with the subject from the standpoint of the wrong done by the defendant, and not from that of the right possessed by the plaintiff. Obviously, if there is a wrong, it is because the plaintiff has some right; and this must be susceptible of a definition.

The right of a person to the enjoyment of his own land and chattels without unjustifiable interference, has been recognized and confirmed so often by decisions that we speak of it as axiomatic; yet there was a time when it was thought necessary to demonstrate its existence, and to define it. If there is any parallel right to the enjoyment of a person's trade or labor, many will not concede it to-day without a demonstration. There are numerous decisions containing definitions of this right, but in most of them the definitions are not very much superior to *dicta*, as in almost every case the decision may be justified by some line of reasoning which is no more the subject of dispute than is the right asserted.

Nevertheless these *dicta* have been so often repeated, particularly in the last few years, that they warrant the assertion that a person has a right to freedom from interference in the exercise of his trade or labor, — a concrete right as distinct as his right to his

lands and chattels, one which imposes on his fellows a correlative duty, the breach of which is a tort, and, therefore, actionable.

The subject has received such careful consideration within recent years, that it is fair to assume that such early authorities as exist have come to view. Those generally cited do not define the extent of the right, but the absence of early authority is the absence of this much authority, that the right does not exist. There are many common law rights as to which the first decisions are comparatively recent, though it is true that most of these are far less fundamental than the one now in question.

Certain interference is generally conceded to be tortious to the trader, namely, interference by an act which apart from the fact that it may or may not be a tort to him is unlawful intrinsically. Thus, to assault his intending customers, if it does intended damage to the trader, is a tort to him;[1] and it would seem that the threat of an assault would be the same. There has been some attempt to place in this same class the cases commonly grouped under the description of unfair competition, such as the simulation of trade devices. These usually involve a tort apart from their effect upon the trader, namely, a deceit to the customer. However, too strong an argument should not be drawn from these cases, as it is possible that they are not a recognition of the right now in question, but merely of the right to good will, or some right analogous thereto, in the nature of incorporeal property. The right to freedom from interference is more nearly one of liberty than of property, — the liberty to acquire property. It can scarcely be treated as good will, although there are suggestions of an analogy;[2] for it exists when the trader or laborer begins his business or occupation, whereas good will is something manufactured by a previous effort in the particular trade.

The early cases do not establish clearly that it is a tort to the plaintiff to interfere with his trade or labor by means even of a tort to his intending customers or employees unless this instrumental tort is a violent one. In Garret *v.* Taylor,[3] the means of interference was the threat of an assault, and also the threat of the institution of groundless suits against the plaintiff's workmen. It is not certain that the court would have regarded the latter means alone as affording the plaintiff a right of action. Even this means,

[1] Garret *v.* Taylor, Cro. Jac. 567; Tarleton *v.* M'Gawley, Peake N. P. 270.

[2] Hawkins in Allen *v.* Flood, [1898] A. C. 1.

[3] Cro. Jac. 567.

Mr. Chalmers-Hunt suggests, may have been unlawful because a contempt of court.[1] In Tarleton *v.* M'Gawley,[2] the act complained of consisted of firing on intending customers, not merely a tort, but an act of violence to the customers.

These early cases are valuable chiefly because they decide that a man's right to pursue his established trade does impose on his fellows some duty of forbearance. Perhaps they mean that this duty prevents interference by means in themselves unlawful, and no more. This character of unlawfulness, however, is obtained from the fact that the acts or threatened acts which constitute the means of interference, are in violation of the defendant's duty, not to the plaintiff, but to a third person, usually the intending customer, or possibly to the public. That is, the act is unlawful because it is a tort to a third person or because it is a crime. Perhaps it would be the same if the defendant's act were a breach of contract with a third person.

The thought at once presents itself, — why should the plaintiff's right of action depend on whether the interference with him is a wrong to somebody else. It is perfectly possible to say that the defendant's duty to the plaintiff is to abstain from injuring the plaintiff's trade by doing violence to his customers, or by committing any manner of tort to his customers, or by committing a breach of contract with his customers, but that no duty exists to abstain from injuring the plaintiff's trade by acts which are just as harmful to the plaintiff, but are not a breach of any duty or obligation to the customer. Although to define the plaintiff's right and the defendant's correlative duty in this way is possible, it is not reasonable.

The important thing to the plaintiff in these cases is that there has been an interference with his trade or occupation which has caused damage to him. To persuade customers not to buy of him, or employers not to hire him, is as much of an injury in fact as to cause the same results by an assault. If the plaintiff's right to his trade or his calling is a thing which is protected against some invasion, it would seem that it should be protected against any equally injurious invasion, unless the defendant can show some justification for his conduct. A distinction between an invasion by violence to a third person and one by persuasion should not be made in the absence of authorities requiring it. If interference by

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[1] Chalmers-Hunt, Trades Unions.

[2] Peake N. P. 270.

acts intrinsically unlawful or violent is a tort to the trader or laborer, it must be because he has some kind of a right to freedom from interference, and the cases already referred to necessarily assume the existence of some such right. They are of no great assistance in determining its extent, but are quite as consistent with the theory of the existence of a right to trade freely with all persons willing to trade with the plaintiff, as with the existence of a right to freedom from interference by violent torts to others. On the other hand there are numerous intimations in the cases of the broader right.

In Keeble *v.* Hickeringill,[1] Lord Holt said, — "Where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood, then an action lies in all cases." This has been characterized as a *dictum*, but it would seem to be something more than this. It is the reason given for holding the defendant liable for preventing wild fowl from entering the plaintiff's decoy, by firing guns on the defendant's adjoining land, with the intention of injuring the plaintiff. It is true that this decision may be supported on other grounds; but these are not the grounds on which Lord Holt based his decision. Of course, where there is more than one possible reason for a decision, there is always danger that the right decision may be reached instinctively, and the wrong reason given. Therefore, the reasoning of the court in such a case does not carry the same weight as where but one line of reasoning will support the decision. Yet it seems inaccurate to term the statement of the reason in such case merely a *dictum*. If, however, this language was merely a *dictum*, it was one of Lord Holt's, and so worthy of careful consideration.

Two kinds of interference are mentioned, — one violent and the other malicious. The authorities cited are cases of violence, — that is, of intrinsically unlawful acts. It would seem, however, that the act in the particular case was not a violent act in this sense. Certainly it was not a violent act to any person but the plaintiff. It was not a tort to the plaintiff except as it injured him in the operation of his decoy. It was not an act intrinsically unlawful, for this, as used in the present connection, means unlawful independently of its effect upon the operation of the trader's business. It was not an act of violence to the plaintiff. If the act was not violent toward the plaintiff, or toward a third person, and Lord Holt

[1] 11 East, 574 n.

was correct in treating the case as one of interference with trade, the case is one of such interference by a malicious act. If so, and the case is to be followed, to interfere with a man's trade by a malicious act is actionable.

The legal meaning of this term "malicious" is not free from doubt. It is frequently used in law as meaning a malevolent act, and often as meaning merely an unjustifiable act independently of any malevolence. It is not certain in which sense it was used in this case. The facts do not necessarily indicate malevolence on the part of the defendant. They do show the absence of such justification for interference as may inhere in a purpose to further a defendant's own trade interests. Unjustifiable rather than malevolent is the meaning which has been attributed to the word more commonly in the later decisions.

Whichever the meaning, the act is one which is not unlawful except as it interferes with the plaintiff's rights, and the decision seems fairly to indicate that a trader has a right to freedom from interference by some acts not intrinsically unlawful, namely, acts for which the defendant cannot show a justification.

In Rogers *v.* Rajendro Dutt,[1] the Supreme Court of Calcutta held that the plaintiff had the right to exercise a lawful calling or trade, that of towing vessels, without undue hindrance from others, and that an order by the defendant, a government officer, that the pilots under the government control, who were the only pilots at the port, should not go upon vessels towed by the plaintiff, was an undue hindrance, and thus actionable. The Privy Council reversed this decision, on the ground that the defendant had acted without malice, and in representing the government, had forbidden its servants to serve with the plaintiff, because he, in the defendant's belief, had attempted to charge the government extortionately for towing government vessels. Even in the Privy Council there is no denial of the trade right of the plaintiff which had been asserted by the lower court, but merely a determination that the defendant's act did not infringe any such right. This may have been because there was a justification for it, namely, the defendant's own right to have the government servants subject to him, work only for those whom he wished; or that the defendant was so far identified with the pilots that there was no interference.

In Allen *v.* Flood,[2] the House of Lords decided that the plaintiff

[1] 13 Moore's Privy Council, 209.

[2] [1898] A. C. 1.

had no cause of action where the defendant had persuaded the plaintiff's employer to discharge the plaintiff by asserting that the members of the union with which the defendant was connected would strike or would be called out unless the plaintiff was discharged. The defendant's reason for doing this was that the plaintiff, although a shipwright, had previously worked on metal work which the union desired to have done by metal workers only. There was no evidence of malevolence toward the particular plaintiff. The jury found that the defendant's act was a malicious one. The reasons given in the different opinions are so conflicting that we cannot regard the decision as an authority for anything beyond the very narrow point decided. It was probably the view of the majority that the defendant's act, even apart from any justification, did not infringe any right of the plaintiff. Lord Shand's opinion followed a distinctly different line, holding that the plaintiff was entitled to pursue his trade without hindrance, but that this right was subject to the same right in others, and that the defendant was pursuing this right. The majority of judges consulted in the case favored a decision for the plaintiff, and their opinions were based upon the ground that a man has a right to pursue his calling without interference by others, unless it be justified, and that there was no justification for it in the particular case.

In Quinn *v.* Leathem[1] it was held that the defendant was liable to the plaintiff where the defendant, as the treasurer of a union, had threatened to induce, and did induce, customers and servants to leave the plaintiff, the inducement of the customers being by a threat that their employees would strike. The reason for the defendant's conduct was the plaintiff's refusal to discharge certain non-union men. The reasons given in the opinion for distinguishing the case from Allen *v.* Flood, indicate that the latter decision was slightly discomforting to some members of the House of Lords. Numerous reasons may be suggested for distinguishing the two cases, but Quinn *v.* Leathem certainly recognizes a right on the part of the plaintiff to freedom from interference in his trade. The interference was not conducted by means which were unlawful *per se*, unless the fact that there was combination constituted unlawfulness, although all the acts done and contemplated would have been free from this quality but for combination. There are

[1] [1901] A. C. 495.

some statements in the opinions giving comfort to those who contend that combined action or combination for action is to be treated differently from individual action, but the opinions as a whole do not base the decision upon this.

Some of those who do not concede that a man has a right to freedom from interference in his trade by means in themselves lawful, attempt to distinguish some of the cases which otherwise would conflict with their view, by saying that they are cases of combination.

While there are many remarks to the effect that combined action is to be treated differently from individual action, it is difficult to find any case where the point is necessarily involved in the decision.[1] Where the purpose of the defendant's act is of importance, the fact of combination may be of considerable evidential value, to show his purpose. Also, if the case is one where the defendant may proceed by persuasion but not by compulsion, the fact that there is combination may be important, as acts which are persuasion merely by one, may become compulsion when done in combination.[2] There may be instances where interference by one person is of so little consequence that the law will not notice it, whereas, when multiplied by combination, it becomes sufficiently serious to warrant action. But apart from such distinctions as these, it is difficult to see why the plaintiff should have any more right to redress where his trade is interfered with by a combination than by an individual.[3]

The language of some cases suggests that the right to freedom from interference in trade or labor may be so broad that it is trespassed upon by mere persuasion addressed to intending customers, or intending employers, which results in damage to the plaintiff.[4] If the right is as broad as this, it is, of course, immaterial whether there is any malevolence or not in the defendant's conduct, until we come to the question of possible justification. The better view, and one which is taken in some jurisdictions, is, stated broadly, that a trader or laborer has a right to freedom

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[1] But see Chalmers-Hunt, Trades Unions; Lord Halsbury and Lord Bramwell in Mogul Steamship Co. *v.* McGregor, [1892] A. C. 25.

[2] Bowen, L. J., in Mogul Steamship Co. *v.* McGregor, 23 Q. B. D. 598; Lord Lindley in Quinn *v.* Leathem, [1901] A. C. 495.

[3] Delz *v.* Winfree, 80 Tex. 400.

[4] Walker *v.* Cronin, 107 Mass. 555; Moran *v.* Dunphy, 177 Mass. 485; Delz *v.* Winfree, 80 Tex. 400; Law Quarterly Review, Jan., 1902.

from any damaging interference in his trade or calling, unless it be justified.[1]

If this view is adopted, one who interferes with another's freedom to trade or to labor commits a tort, unless he can show a justification for the interference. This possible tort-feasor himself has a right to the free exercise of his own trade or calling within certain limits. If, therefore, in his interference he exercises this right, the interference is justified, and he is not a tort-feasor.

There is some uncertainty whether he must establish not only that his acts are reasonably adapted to the furtherance of his own interests, but also that in fact he acted for this purpose; in other words, whether malice in fact, *i.e.*, malevolence, will deprive him of what would otherwise be a justification. It may be doubted whether it will. One is perplexed in this inquiry by the varying use of the word "malice." In most of the cases, the word is used to signify absence of justification merely, and not necessarily malevolence. In Allen *v.* Flood, most of the opinions use it in the former sense. Lord Shand, who deals with the case as one of justification, says distinctly that ill-will would not affect the result. Since in Quinn *v.* Leathem the facts do not show ill-will, malice is probably there used to signify absence of a justifiable occasion; and yet Lord Brampton draws an analogy from the malice which prevents a justification in malicious prosecution. In Mogul Steamship Company *v.* McGregor[2] the opinions in both courts consider not ill-will, but the presence of a justifiable object. On the other hand, in Vegelahn *v.* Guntner[3] and Moran *v.* Dunphy[4] malice may mean malevolence.

One of the analogies suggested as making malevolence of importance is malicious prosecution, — where the absence of malevolence is necessary to a complete justification, or rather its presence, to a complete cause of action. The mere fact that this would furnish an analogy is hardly enough to compel the application of the same rule to the present class of cases. There are analogies for the opposite view. One having an easement of passage, which is but the privilege to interfere with the exclusive occupancy of the owner of the servient tenement, would not be a trespasser merely because he walked solely for the purpose of annoying this

[1] But see Allen *v.* Flood, [1898] A. C. 1; Orr *v.* Home Mutual Ins. Co., 12 La. An. 255.

[2] [1892] A. C. 25; 23 Q. B. D. 598.

[3] 167 Mass. 92.

[4] 177 Mass. 485.

owner, *i. e.*, from malevolence. Further to apply the analogy of malicious prosecution strictly, would be to hold that interference is not actionable even in the entire absence of a justifying object, unless it appears by presumption in fact, or by evidence that the defendant acts from malevolence. This is negatived by numerous cases already mentioned.

If the accident of an analogy were the proof of a proposition, such could be found in the law of libel where the defense of a privileged communication cannot be maintained, if the defendant wrote for a malevolent purpose.

The real question is, or will be, which is the wiser rule in its practical application. If the law were administered by an omniscient tribunal, it would seem wise to say that interference by a person by means adapted to furthering his own interests is not justified where it is prompted by a purpose not to further these interests, but to do harm to another. Intentional damage has been inflicted, a thing which should not be permitted unless some good may be accomplished or is intended. On the other hand this rule would add to the law one more uncertainty. It would be an uncertainty arising in many cases, while the actual fact would exist in very few. The cases must be rare where a man has legitimate ends to serve, and yet seeks not to serve them but only to injure his competitor, — so rare as not to warrant in every case an inquiry into the condition of the defendant's mind. As a practical matter, there is no more reason for defeating a privilege by showing ill-will, than for making actionable all damage done in a spirit of ill-will. Certainly the law does not do this.

The class of cases where ill-will may be expected to play some part is where there is no interest of the defendant which can be served, and yet his interference is justified, such as cases of advice to friends for their benefit. It is improbable that a defendant would be held liable for advising a friend not to buy of the plaintiff or not to hire the plaintiff, if the defendant acted without ill-will and in the belief that the advice was required for the friend's protection;[1] but the defendant may be liable where he gives the same advice through a desire to injure the plaintiff. There is more reason for introducing the uncertainty of an investigation of mental condition, here, than where the alleged justification is benefit to the defendant's interests. A defendant will cloak malevolence with an ap-

[1] Walker *v.* Cronin, 107 Mass. 555.

parent desire to help friends, much more frequently than he will disregard his own interests and act purely from malevolence, when he has interests which would be served by the same interference. Of course, those who deny the existence of the larger right to freedom from interference regard the case of advice to friends as somewhat in proof of their position, and say that the addition of malevolence does not make a cause of action; but it is submitted that such advice can better be dealt with as interference justified by a privilege not very unlike that found in some cases of slander.

If malevolence is not to be considered, the question of justification resolves itself into two elements, namely, — (1) the object which the interference is naturally adapted to accomplish; (2) the means employed in the interference. In some of the cases, the two are dealt with at once, making it difficult and sometimes impossible to determine whether it is the object or the means which the court regards as unjustifiable; but many of the cases leave no doubt on this subject.

Certain objects will justify interference, by justifiable means, with another's freedom to trade or labor.

Increasing one's custom by obtaining the customers of others, buying as low as possible, or selling as high as possible, whether the thing bought or sold is a commodity or is labor; giving as small a quantity as possible for the price, either of materials or labor; selecting associates or employers in labor or trade; or bettering the conditions and surroundings under which one labors, — are all objects which give a person the privilege to inflict on another damage in fact in the other's trade or labor, although this damage intentionally done might be actionable in the absence of such an object. While these are not the only objects which bestow a privilege, they are typical of the more obvious class.

A more troublesome question is presented when these objects are remote, and the immediate object is in itself but a means. The ultimate object of trades unions is doubtless to better the situation of their members, in such matters as the hours of labor, their wages, and the conditions under which they labor. The ultimate object of the combinations of traders and employers is, likewise, to better the situation of the combiners in such matters as the prices paid for labor, the cost of materials, and the prices of products. Where defendants act in such unions or combinations, is their ultimate object or their immediate object the test of their privilege?

Here, as on almost all questions connected with this subject, there is a difference of opinion.

In Allen *v.* Flood, the immediate object was to punish the plaintiff for working contrary to the rules of the union with which the defendant was connected. The ultimate object was to secure for this union all the work of a particular kind. Lord Shand looked at the ultimate object, and considered it a justification. Some of the judges consulted, looked at the immediate object, and considered it not a justification.

In Quinn *v.* Leathem, the immediate object was to obtain the discharge of men whom the plaintiff wished to employ, the more remote object was to punish these men for non-payment of dues, and doubtless the final object was to strengthen the defendant's union. The case may be disposed of regardless of the object, by the means employed, but no doubt was expressed but that the object was not a justification. Temperton *v.* Russell[1] is a similar case.

In Lucke *v.* Clothing Assembly,[2] Curran *v.* Galen,[3] and Plant *v.* Wood,[4] the object was, in the first, to keep the work in the hands of the union, in the last two, to have the plaintiffs join the union. This object was held not a justification, but with a dissent in the last by Justice Holmes.

In Longshore Printing Company *v.* Howell,[5] the object was to secure the discharge of apprentices employed in excess of the number prescribed by the rules of the union, and was held a justification.

In Thomas *v.* Cincinnati,[6] Old Dominion Steamship Company *v.* McKenna,[7] and Toledo *v.* Pennsylvania,[8] the object was an increase in the wages of third persons, — in the last case, persons of whom the defendant was the appointed representative, *i. e.*, the head of their union. It would seem that both the object and the means were held unjustifiable.

In Bohn *v.* Hollis,[9] Jackson *v.* Stanfield,[10] and Carew *v.* Rutherford,[11] the immediate object was to compel the payment of a penalty imposed by the combination or union, which the plaintiffs

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[1] [1893] 1 Q. B. 715.
[2] 77 Md. 396.
[3] 22 N. Y. Supp. 826.
[4] 176 Mass. 492.
[5] 26 Oreg. 527.
[6] 62 Fed. Rep. 802.
[7] 30 Fed. Rep. 48.
[8] 54 Fed. Rep. 730.
[9] 54 Minn. 223.
[10] 137 Ind. 592.
[11] 106 Mass. 1.

were under no legal obligation to pay. This should be no justification. It was so held in the last two cases. In the first it was held that the defendant was not acting tortiously. Perhaps the court meant not that there was a justification, but that there was no interference.

In Clemmitt *v.* Watson,[1] it would seem that the court thought that the right to select one's companions in labor was a justification for combined refusal to work with the plaintiff.

In Scottish Co-operative Company *v.* Glasgow Fleshers' Trade Association[2] and in Macauley *v.* Tierney,[3] the object was to deprive a competing seller of his supply. This would seem to be a justification, and was so held in the latter case. In the former the defendant in fact prevailed, but the court does not make the grounds of its decision perfectly clear.

In Mogul Steamship Company *v.* McGregor, the immediate object was to obtain the plaintiff's custom, which was a justification.

In Cote *v.* Murphy,[4] the immediate object was to punish the plaintiff for yielding to the demands of strikers. The ultimate object was to secure their employees at lower wages. This was held a justification.

It seems to be the opinion of the court in United States *v.* Weber,[5] that it is unlawful to combine to monopolize labor for the purpose of enhancing the price of it unreasonably. If this view were taken, either all combinations to enhance wages should be held unlawful, as raising the price of labor beyond that fixed by the natural demand, or else the reasonableness of the price contemplated by the particular combination should be determined by the court in each case. The first alternative conflicts with the view generally expressed. The second is almost impossible of practical application. The fact that a monopoly is intended is but an incident which may be expected to add to the success of the plan, and it may make the agreements *inter se* unenforcible, but should not, apart from statutes, render the combination unlawful, if it would otherwise be lawful.[6] It would seem that apart from statutes a man should be permitted to obtain for his labor or wares as high a price as possible, even if this exceeds their reasonable value

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[1] 14 Ind. App. 38.
[2] 35 Sc. L. R. 645.
[3] 19 R. I. 255.
[4] 159 Pa. St. 420.
[5] 114 Fed. Rep. 950; see U. S. *v.* Haggerty, 116 Fed. Rep. 510.
[6] Mogul Steamship Co. *v.* McGregor, [1892] A. C. 25; but see Cote *v.* Murphy, 159 Pa. St. 420.

under the normal conditions of supply and demand. If he can do it alone, he should be permitted to do it in combination.

Instances of justifiable objects may be multiplied almost indefinitely, and still leave the subject in much doubt. The better view would seem to be that it is the immediate object at which the court should look, in deciding whether the interference is justified. Damaging interference should be permitted only where it may contribute directly to the result which the defendants are entitled to attain. It should not be enough that some possible benefit may come to them at some uncertain future time. They should be permitted to interfere for the purpose of procuring the plaintiffs' discharge in order to obtain their places, of procuring others to refuse to work for the defendants' employer at lower wages than the defendants are willing to accept, or of procuring others not to buy of the plaintiffs if these others will thereupon naturally buy of the defendants. They should not be permitted to interfere for the purpose of extorting money which there is no obligation to pay, of inducing men to join their union, or of punishing them for disobedience of its rules. It is competition which furnishes the justification, but competition in its more limited sense. Interference with the plaintiff cannot be permitted for the purpose of inducing or compelling him to do something, merely because the defendants honestly believe that mankind or a large part of mankind will thereby be bettered.

If a person's object is one which may justify some interference with another's freedom in trade or labor, yet the interference must be by means which are justifiable. It is apparent that interference by physical violence is not permissible. Perhaps it is safe to say the same of any act which is intrinsically a tort. The more troublesome question is where the acts of interference are in themselves lawful, and become wrong, if at all, only because they are a means of interference with the freedom of the plaintiff trader, or laborer.

It seems that combination for a lawful object is not of itself an unlawful means. It may, however, in some cases turn mere persuasion into practical compulsion, intimidation, or molestation. Except in these cases, it is the acts done in combination which give it its character. However, there may be unjustifiable acts done in forming the combination. It is frequently said that any one person may refuse to work except on terms agreeable to him, and that any number of persons may combine to do the same.

This is true in a measure; but yet the first act of interference may come in the formation of the combination. Where one man refuses to work for the plaintiff, he does not interfere with the plaintiff's freedom of trade, because interference presupposes that there is some one who might trade with the plaintiff if the defendant did not persuade or prevent him from doing so. The defendant does not interfere with the plaintiff's trade. He merely does not trade with him. So there is no interference where a number of men coincidently refuse to work for the plaintiff.[1] Hence no justification is required. As soon, however, as one-half of the combination persuades the other not to work, there is an interference, not by the whole but by the first half. Then a justification must be found.[2]

A union leader who orders a strike is usually by prior choice the agent of the employees, and acts on their behalf. If so, his act in ordering a cessation of labor is not an interference, if their act in ceasing would not be; but if he acts not as their agent, but influences them to cease, he interferes, and a justification must be found. What is true of the combined ceasing to labor, is true of the combined ceasing to employ, buy, or sell. Hence, the mere refusal of the defendants in combination to deal with the plaintiff is usually something which requires no justification; but if one induces another to refuse, there is interference which does require a justification.

Carew *v.* Rutherford[3] is very near the dividing line. The defendants left the plaintiff's employ in combination. It may be doubted whether so much would constitute an interference; but other employees, not members of the defendants' association, also left. The court treats the act of the defendants as combining to induce others not to labor for the plaintiff, and intimates that men may combine not to labor. It is not left entirely clear, however, whether the court would or would not have regarded the defendants' conduct as tortious if it had been limited to acting upon the members of their own association in pursuit of one of the objects for which it was formed.

The most innocent means of interference is persuasion. This may be of at least two kinds, namely, that which directly affects the commodity or labor in dispute, and that which does not.

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[1] Delz *v.* Winfree, 80 Tex. 400.

[2] Consider Carew *v.* Rutherford, 106 Mass. 1.

[3] 106 Mass. 1.

Where employees singly or in combination withhold their labor from the plaintiff in an effort to get higher wages, they should be permitted by peaceable means to persuade other laborers not to take their places; and probably it would be so held generally. Such persuasion, if successful, directly affects the value of the defendant's labor, as it lessens the supply. The same is true conversely where the defendants are employers seeking to reduce wages. So defendants seeking to lower the price of materials or to raise the price of products, should be permitted to persuade other buyers in the one case, or sellers in the other, not to buy of the plaintiff or not to sell to him. All such persuasion directly affects the immediate supply or demand for the defendants' labor or wares.

Where employees withhold their labor from the plaintiff, and for the purpose of inducing him to accede to their demands, persuade his customers not to buy of him until he surrenders, they do something which is foreign to the labor which is in dispute. Such persuasion should not be permitted. It either accomplishes nothing, or else becomes momentous enough to be a subtle kind of coercion. This view may not be favored, however, and is in conflict with the language of some opinions.[1] The rule should be the same in the converse case, *i. e.*, where the employer persuades provision dealers not to sell to the employee until he submits to lower wages.

The distinctions between the kinds of persuasion described in the preceding two paragraphs, is crudely expressed as the difference between a peaceable strike and a peaceable boycott; but both of these words are too uncertain of meaning to be either helpful or safe.[2]

Although the laborer may be permitted to persuade others not to deal with his employers, he cannot influence them by physical intimidation, molestation, or coercion, or by threats of these. Threats are sometimes called a prohibited means, but it seems obvious that the threat must get its character from the act threatened. If such act is a permissible means of interference, then so is the threat of it; and the converse is true.

When the intimidation, molestation, or coercion is not physical, the case is not so clear. The tendency seems to be, and rightly

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[1] Plant *v.* Wood, 176 Mass. 492; Vegelahn *v.* Guntner, 167 Mass. 92.

[2] Arthur *v.* Oakes, 63 Fed. Rep. 310.

so, to treat interference by such means as unjustifiable. What constitutes moral coercion, intimidation, or molestation is another troublesome question. When, as in Quinn *v.* Leathem, a customer is threatened in substance with the entire cessation of his business if he buys of the plaintiff, he still is free to buy of the plaintiff if he wishes. His choice is not, however, free in the same sense that it is when he decides between the wares of the plaintiff and those of another dealer, on account of their relative value to him.

In Vegelahn *v.* Guntner,[1] the opinion of the majority seems to discountenance conduct which makes employment unpleasant or intolerable, or amounts to moral intimidation, such as exists in picketing or patrolling; and in Plant *v.* Wood,[2] the same is true of acts which take away the free will of the customer. Mr. Justice Holmes dissents in both cases. Of course in the latter case the object as well as the means is held to be wrong.

In Temperton *v.* Russell,[3] there are intimations that the combined persuasion of third persons not to buy is a wrongful means. Here also the object is wrong. But in Scottish Cooperative Company *v.* Glasgow Fleshers' Trade Association,[4] where the object was a proper one, it was held permissible to induce a third person not to sell to the plaintiff by a threat that the defendants in combination would otherwise refuse to buy.

If the defendants threaten to cease purchasing from a seller unless he refuses to sell to the plaintiffs, it would seem that the defendants do not coerce the seller.[5] They give him a choice between two things of the same kind, which are the very subjects of the competition, namely, — the plaintiffs' trade and the defendants' trade. If the latter is much more valuable than the former, the seller's selection will be affected thereby; but thus by the intrinsic worth only of the thing chosen, and not by a fear of unrelated consequences. The case is similar where the plaintiffs and defendants are competing sellers, employers, or laborers. The defendants' threat to cease selling, employing, or laboring, leaves the third person a choice which is affected by nothing but the comparative value of competing things of a like kind.

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[1] 167 Mass. 92; consider Taff Vail R. R. Co. *v.* Amalgamated Society of Ry. Servants, in King's Bench Div. of High Court of Justice, Dec., 1902.

[2] 176 Mass. 492.

[3] [1893] 1 Q. B. 715.

[4] 35 Sc. L. R. 645.

[5] Macauley *v.* Tierney, 19 R. I. 255.

Where the object is proper, there is a difference of opinion as to whether a refusal in combination to labor for a third person, or to buy of him for the purpose of inducing him not to trade with the plaintiff, is a permissible means. As a practical matter this usually destroys the freedom of the third person to choose. If interrogated, the most common form of answer would be that he was "afraid" to buy or to employ. The defendant should not be permitted to produce such a condition in fact.

In Allen *v.* Flood, there was a difference of opinion as to whether this amounted to coercion. If there is such a thing, this would seem to be moral coercion. Of course this kind of fear is not created by every strike or boycott. Its magnitude is of importance. If the case is such that the courts will say that it is permissible to interfere by persuasion but not by coercion, it would seem proper to test the propriety of the means employed, by the effect which they will naturally produce upon the ordinary man. If the strike or boycott threatened will override his freedom of choice, it should not be permitted. Here the element of combination is important, not because it makes the act that of several, but because it makes the act more forceful. The threat of withdrawal of custom by the farriers of a country town should not be given a larger effect than a similar one uttered by the United States Steel Corporation, although the latter is a single entity.

While the combined withdrawal of labor or of custom from the plaintiff by the defendants does not ordinarily constitute an interference, it has been held that there may be features of such a combination which differentiate it from the ordinary, and thus present a case of interference by coercion. In Boutelle *v.* Mair,[1] the defendants in combination imposed fines on members dealing with non-members. As a result, no one would deal with the plaintiff, not a member. This was held unlawful, as the enforcement of the will of the majority of the association upon the minority by means of fines and penalties made the withdrawal of custom not voluntary, but induced by intimidation. The court considered that the concert of action having been obtained by coercion, was not made lawful by the fact that the members of the association had originally agreed to the passage of the coercive rules. In Mantell *v.* White, on very similar facts, the Superior

[1] 71 Vt. 1.

Court of Massachusetts ordered a verdict for the defendants. Exceptions to this ruling were argued in the Supreme Judicial Court in December, 1902.

It is regarded lawful and proper to combine to keep trade within the membership of the combination. Obviously members so agreeing should keep their agreements. If they do, the plaintiff sustains his damage, but has sustained no injury. It would seem that the addition of provisions for fines, and expulsion for breach of agreement, is a reasonable means of compelling the members to do what they ought to do any way, namely, to do as they agreed. Then a fine levied pursuant to previous agreement is not a coercive measure. The freedom of choice thereby attacked was voluntarily surrendered in advance.

An element of moral coercion is introduced if the membership in the combination or acquiescence in the non-trading agreement was not voluntary originally. This may be not infrequently the case. Coercion in this form should not be permitted.

It should not be overlooked that furthering the defendants' interests will not justify them in inducing a breach of contract.

The conflicting rights of trade and labor are too many to be dealt with exhaustively in an article of permissible length; and the present one is intended as suggestive merely. The cases in the footnotes are not offered as supporting the text, but as bearing on it.

With numerous qualifications, this may be asserted as the better view, namely, — where a man, or combination of men, refuses to deal with a plaintiff, there is no interference with the latter's freedom in trade or labor. Where a man, or combination of men, intentionally induces a third person not to deal with the plaintiff, and thereby causes him damage, there is an interference with the latter's right to freedom in trade or labor, and a tort has been done him, unless the interference is justified. It is justified only if the defendants have interests which may reasonably be served thereby, or act for the interests of others whom it is proper that they should so serve, and the interference is by means which are permissible. Means are not permissible which deprive the third person of the exercise of free will.

Edward F. McClennen.

BOSTON, December 26, 1902.